

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 3450/2019

Naseem Akhtar Thru LR's

..VS..

Tayyabbai Wd/o Jahiruddin Thru LR's

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri V.B. Bhise, Advocate for the petitioner(s)

Shri C.A. Joshi, Advocate for the respondent nos. 1 to 4

CORAM : Z.A.HAQ, J.

DATED : 05/08/2019

R.C.S. No. 473/1999 filed by the original plaintiff (predecessor of the petitioners) seeking decree for cancellation of the agreement dated 11/03/1991 was dismissed by the trial Court by the judgment dated 26/03/2003. The judgment passed by the trial Court was challenged by the plaintiffs in R.C.A. No. 106/2005. In the appeal, the plaintiffs had moved an application seeking permission to amend the plaint to plead that protection under Section 53A of the Transfer of Property Act, 1882 (for short "the Act of 1882") was not available to the defendants. The District Court had allowed the application filed by the plaintiffs. By the judgment dated 22/04/2010, the District Court had decreed the claim of the plaintiffs. The defendants had challenged the judgment and decree passed by the District Court before this Court in S.A. No. 493/2010. By the judgment dated 17/09/2012, this Court remanded the matter to the trial Court for fresh decision. After remand, the defendants filed the application (Exh. 103) seeking permission to effect consequential amendment in the written

statement to counter the plea raised by the plaintiffs that the defendants were not entitled for protection as per Section 53A of the Act of 1882. The trial Court had dismissed the application (Exh. 103) by the order dated 02/02/2013 and then by the judgment dated 20/04/2013 decreed the claim of the plaintiffs. The defendants had challenged the judgment and decree passed by the trial Court by filing R.C.A. No. 26/2013 before the District Court which was dismissed by the judgment dated 11/01/2017. The defendants had then filed S.A. No. 453/2017 before this Court. In the second appeal, substantial questions of law were framed, one of it being as follows:-

“Whether the appellate Court erred in not deciding the challenge as raised to the order passed by the trial Court below Exhibit-103 ?”

This Court decided S.A. No. 453/2017 by the judgment dated 13/07/2018. The proceedings came to be remanded to the District Court for deciding R.C.A. No. 26/2013, considering all the grounds raised in the memorandum of appeal, one of the ground being that the order passed by the trial Court rejecting the application (Exh. 103) was unsustainable.

In view of the directions given by this Court while remanding the proceedings to the District Court, the learned District Judge took up the matter for consideration of legality of the order passed by the trial Court on the application (Exh. 103). By the impugned order, the learned District Judge has held that the application (Exh. 103) has to be allowed as the defendants have sought permission to incorporate the

consequential amendment to counter the claim of the plaintiffs that protection as per Section 53A of the Act of 1882 would not be available to the defendants.

The order passed by the learned District Judge allowing the application (Exh. 103) and permitting the defendants to effect the consequential amendment is challenged on the ground that the District Court could not have considered the challenge to the order passed on the application (Exh. 103) by the trial Court independently, and if at all it required any consideration, it should have been at the stage of deciding the appeal. The other ground is that the defendants have failed to explain the inordinate delay in raising the challenge to the order passed on the application (Exh. 103).

It is relevant to note that the defendants in R.C.S. No. 473/1999 have also filed civil suit which is registered as R.C.S. No. 37/2013 praying for decree for specific performance of agreement. R.C.S. No. 37/2013 was dismissed by the trial Court by the judgment dated 20/10/2014 on the ground that the claim in the civil suit was barred by limitation. The judgment and decree passed by the trial Court was challenged by the present respondents in R.C.A. No. 28/2014 which was also dismissed by the District Court by the judgment dated 11/01/2017. The present respondents had filed S.A. No. 454/2017 before this Court. By the judgment dated 13/07/2018, this Court has remanded the proceedings to the trial Court for fresh consideration. Presently, R.C.S. No. 37/2013 is pending before the trial Court.

After considering all the aspects and looking to the history of the litigation, I find that the learned District Judge has not committed any error by permitting the respondents to incorporate the amendment proposed by the application (Exh. 103). It cannot be said that the order passed on the application (Exh. 103) would cause any substantial prejudice to the petitioners.

I see no reason to interfere with the impugned order.

Hence, the writ petition is **dismissed**. In the circumstances, the parties to bear their own costs.

JUDGE

Ansari